

DIFFERENTIAL ENERGY, INC.

IBLA 86-10

Decided October 16, 1987

Appeal from a decision of the Oregon State Office, Bureau of Land Management, affirming the rejection of notice of mining operations and requiring a plan of operations. OR 020-82-15P.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations -- Mining Claims: Plan of Operations

The surface management regulations at 43 CFR Subpart 3809 implement the mandate of sec. 302(b) of the Federal Land Policy and Management Act of 1976 to manage the public lands to prevent unnecessary and undue degradation. A decision of BLM requiring a mining claimant to operate under an approved plan of operations on the basis that mining operations would cause a cumulative surface disturbance in excess of 5 acres during a calendar year will be affirmed where appellant fails to sustain the burden of showing that 5 acres or less is involved. Although the regulations governing reclamation of disturbed areas permit deferral of reclamation for legitimate mining purposes, unreclaimed surface disturbance from a prior year's operation is properly included in the acreage computation for purposes of determining whether a plan of operations is required.

APPEARANCES: Thom Seal, Engineer, Differential Energy, Inc., Prairie City, Oregon, for appellant; Eugene A. Briggs, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Northwest Region, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Differential Energy, Inc., has appealed from a July 24, 1985, decision of the Associate State Director, Oregon State Office, Bureau of Land Management (BLM), affirming a May 17, 1985, decision of the Three Rivers Resource Area Manager, BLM. The latter decision rejected appellant's notice of operations concerning mining on public lands at the Cougar Ridge mine situated in secs. 1, 2, 11, and 12 of T. 12 S., R. 33 E., Willamette Meridian, in Grant

County, Oregon. That decision also held that before mining operations could commence appellant was required to submit an approved plan of operations under 43 CFR 3809.1-4 for the Cougar Ridge mine.

Appellant is the operator of the Cougar Ridge mine and is employed by D-C Mining Company, which owns the mining claims on which the mine is situated. On June 15, 1984, appellant filed with the Burns, Oregon, BLM District Office a plan of operations for the Cougar Ridge mine for 1984. BLM then prepared an environmental assessment (EA) for appellant's proposed plan of operations. Pursuant to the results of the EA, BLM informed appellant in a letter dated September 14, 1984:

Your plan of operations could not be approved as submitted because it would not provide for reasonable reclamation and could involve some unnecessary and undue degradation of lands. However, as an alternative, we reviewed a number of modifications which could reduce the impacts to a reasonable level. These modifications are described at length in the environmental assessment. Please review the document and determine whether the modifications are acceptable to you.

We have approved the modified plan for the mining and milling operations, contingent upon your agreement to the mitigating measures. In order for our approval to take effect, we will need the following:

1. A written statement, signed by authorized representatives of D & C Mining, Inc., Differential Energy, Inc., and Shangrila Mining, indicating that you have agreed to all of the mitigating measures identified in the environmental assessment under the modified plan.
2. A bond in the amount of \$5,100 (or its equivalent under 43 CFR 3809.1-9) to cover the cost of reasonable stabilization and reclamation of all areas disturbed by mining and milling operations under this plan.

The mitigating measures identified in the EA addressed various aspects of mining and reclamation activities on the public lands affected by the mine by making specific recommendations as to how these activities should be accomplished.

Appellant did not respond to the September 17, 1984, letter, or acknowledge agreement to the mitigating measures or the bond requirement outlined in the EA. However, BLM subsequently received on May 6, 1985, a Notice of Operations from appellant which informed BLM that appellant intended to conduct mining operations on the Cougar Ridge mine "from May 15 until winter closes operations for 1985." The notice further stated that total surface disturbance on the mine would "be kept at less than 5 acres."

In a letter dated May 17, 1985, the BLM Three Rivers Resource Area Manager informed appellant that its notice of operations had been rejected "because a plan of operations is still required." The letter further outlined:

We approved your plan of operations for the Cougar Ridge mine last year, subject to certain plan modifications and conditions specified in our environmental assessment. * * *

Our examination of the site in 1984 indicated that a plan of operations was required because surface disturbance from your operations at that time was about 8.5 acres. With the additional surface disturbance proposed from logging, construction of mill facilities at your Standard Creek mill site, drilling, prospecting and sampling activities, reopening of caved adits for subsurface operations, and surface disposal of waste rock from subsurface operations, the total surface disturbance was expected to be about 17 acres.

* * * * *

Your description of the operations does not go into great detail, but the 1984 plan of operations included essentially the same items as your present notice. Please note that rejection of your notice does not mean that a new plan is required. Since your 1984 plan has already been reviewed, there is no need to submit another plan of operations for 1985, unless major changes are proposed.

Please refer to your copy of our [September 17,] 1984 decision and environmental assessment for the details of the plan modifications and conditions of approval. Only two conditions must be met before you can start operations under that plan:

- 1) You must submit a performance bond or its equivalent in the amount of \$5,100 to this office before any operations can commence.
- 2) Before any construction of mill facilities at the Standard Creek mill site could begin, we require that you provide BLM with copies of all permits or approvals from other Federal, State or local agencies for that activity.

Until you have fulfilled these approval conditions for your plan, you may not perform operations (other than casual use) in the project area. If you have already begun work in the project area, please stop all operations that exceed casual use immediately. Your cooperation in this would be appreciated. Failure to operate in accordance to the plan would be considered noncompliance under [43] CFR 3809.3-2.

The letter further informed appellant of its right to have the decision rejecting its notice of operations reviewed by the BLM Oregon State Director in accordance with 43 CFR 3809.4.

By notice of appeal filed June 3, 1985, appellant sought review by the State Office of the May 17, 1985, Area Manager's decision. In affirming the Area Manager's decision, the Associate State Director first rejected appellant's objections relating to the BLM actions taken in adjudicating the plan of operations filed in 1984:

It appears from the record that Appellant filed a plan of operation with the Burns office of BLM on April 11, 1984.^[1/] The plan was approved, on September 14, 1984 subject to conditions and modifications specified in an environmental assessment. No appeal was taken from that conditional approval. Objections raised now because of alleged acts or failures to act by the BLM in June and July of 1984 are untimely and are rejected.

The Associate State Director then considered the argument by appellant that the requirement for approval of the mine plan of operations was a material interference by BLM with mining on the public lands and concluded:

We do not believe that the making of an environmental assessment on a proposed plan of operation is a material interference with mining. Nor do we believe that the requirement stated by the Area Manager for a performance bond and, prior to construction of mill facilities, for copies to be supplied the BLM of all permits or approvals from other Federal, State or local agencies, are a material interference with mining operations. To the contrary, these requirements are specifically authorized by the regulations, 43 CFR 3809.1-9; 3809.2-2, 3809.3-1. We also find that the Burns District has adequately documented that over 5 acres of new surface disturbance has resulted from the Appellant's mining operations and access road developments to necessitate the need for a plan of operation under 43 CFR 3809.

(BLM Decision of July 24, 1985).

In the statement of reasons for appeal to this Board, appellant asserts that no plan of operations was required because the surface disturbances projected during the calendar year involved less than 5 acres. Appellant cites

^{1/} Rather than a plan of operations as indicated in the State Office decision, appellant filed with BLM on Apr. 11, 1984, a notice of operations pursuant to 43 CFR 3809.1-3. By letter dated May 9, 1984, BLM informed appellant that the notice of operations could not be accepted because appellant's operations at that time were in noncompliance due to a cumulative surface disturbance in excess of 5 acres and the failure to file a plan of operations as required by 43 CFR 3809.1-4. This letter also directed appellant to file "a detailed plan of operations" in order to bring the operations into compliance. The plan of operations was subsequently filed on June 15, 1984.

a statement by a State of Oregon geologist to the effect that total surface disturbance is less than 1 acre and, hence, the mine is exempt from State bonding, reclamation, and permit requirements. Appellant contends BLM has not adequately documented over 5 acres of new surface disturbance since 1981. 2/ Further, appellant contends the decision is an improper infringement of the right of a mining claimant to develop a Federal mining claim. Accordingly, the issue raised by this appeal is whether BLM properly found the area of surface disturbance entailed by appellant's operations to be in excess of 5 acres and, hence, properly rejected appellant's notice of operations and required an approved plan of operations.

As previously noted, appellant did not respond or agree to the conditions for approval of the plan outlined in the 1984 decision, nor did it seek timely review of the decision. An appeal must be filed within 30 days of receipt of the decision under appeal. 43 CFR 4.411. The time limit is jurisdictional and the failure to file a timely appeal mandates dismissal of any attempted appeal of that decision at this time. See Ilean Landis, 49 IBLA 59 (1980). Accordingly, we agree with the Associate State Director that appellant's objections to acts or failures to act by BLM in 1984 are untimely and should be rejected. We do consider, however, appellant's arguments insofar as they relate to the question of whether BLM properly rejected appellant's 1985 notice of operations. 3/

[1] In managing the public lands the Secretary of the Interior is mandated by law to "take any action necessary to prevent unnecessary or undue degradation of the lands." Federal Land Policy and Management Act of 1976 (FLPMA), § 302(b), 43 U.S.C. § 1732(b) (1972); see Draco Mines Inc., 75 IBLA 238 (1983). This provision was expressly recognized in sec. 302(b) of FLPMA as affecting the rights of claimants under the Mining Law of 1872. The surface management regulations of 43 CFR Subpart 3809 were promulgated pursuant to this authority.

The crux of appellant's argument against imposing the requirement for approval of a plan of operations and against rejecting its May 6, 1985, notice of operations is its contention that it is exempt under 43 CFR 3809.1-3 from the requirement to operate under a BLM-approved plan of operations. This regulation provides in pertinent part:

2/ Appellant has also asserted that a "cadastral survey" is required "to document pre-1980 surface disturbance * * * and the area of operation disturbed since 1980." This assertion is without merit. To the extent appellant's argument implies that any formal survey was required in this instance, it is rejected.

3/ Counsel for BLM seeks to have this appeal dismissed on the grounds Thom Seal, the individual who filed the notice of appeal on behalf of appellant, does not come within any of the categories of individuals eligible under 43 CFR 1.3 to practice before the Department. Counsel claims that because Mr. Seal is employed by appellant, which has no ownership interest in the Cougar Ridge mining claims, he is not eligible to practice before the Department in this proceeding. We disagree. Under 43 CFR 4.410, appellant,

(a) All operators on project areas whose operations, including access across Federal lands to the project area, cause a cumulative surface disturbance of 5 acres or less during any calendar year shall notify the authorized officer in the District office of the Bureau of Land Management having jurisdiction over the land in which the claim(s) or project area is located. Prior to conducting additional operations under a subsequent notice covering substantially the same ground, the operator shall have completed reclamation of operations which were conducted under any previous notice. Notification of such activities, by the operator, shall be made at least 15 calendar days before commencing operations under this subpart by a written notice or letter.

(b) Approval of a notice, by the authorized officer, is not required.

In its May 6, 1985, notice of operations, appellant stated: "All operations will have less than 5 acres total cumulative surface disturbance." In rejecting appellant's notice, BLM stated: "your description of the operations does not go into great detail, but the 1984 plan of operations included essentially the same items as your present [1985] notice" (BLM May 17, 1985, decision at 2). Rather than the 5-acre figure proposed by appellant, BLM calculated a total surface disturbance area from appellant's operations at "about 17 acres," including 8.5 acres of existing unreclaimed surface disturbance disclosed in the 1984 field examination. *Id.* Accordingly, BLM concluded that a plan of operations was required under 43 CFR 3809.1-4, which provides in pertinent part: "An approved plan of operations is required prior to commencing * * * [o]perations which exceed the disturbance level (5 acres) described in [43 CFR 3809.1-3]."

A central issue in the controversy is to what extent surface disturbance from existing operations is properly included in calculating the acreage disturbance from operations in any given year in order to determine whether more than five acres is involved, thus requiring a plan of operations. BLM explained in a May 9, 1984, letter from the Area Manager to appellant that appellant's "contention that the 43 CFR 3809 regulations allow you to add up to five acres of surface disturbance to a project area each year under a notice of operations without reclaiming the previous years disturbance is erroneous" (May 9, 1984, letter at 2). The letter further responded to appellant's assertion that the majority of the 1983 surface disturbance was not

fn. 3 (continued)

as a party adversely affected by a decision of a BLM officer, clearly has standing to appeal from the Associate State Director's decision. Accordingly Mr. Seal, an engineer employed by appellant, was authorized to file the appeal under 43 CFR 1.3(b)(3)(iii), which provides that an individual who is a full-time employee of a corporation can practice before the Department on behalf of the corporation. Counsel for BLM has not alleged nor does the record give reason to conclude that Mr. Seal was not a full-time employee of appellant at the time of filing the notice of appeal.

reclaimed in order to preserve evidence of mineralization. The BLM Area Manager explained that "although the deferral of reclamation is permitted for this reason under 43 CFR 3809.0-5(j) and 43 CFR 3809.1-3(d)(5), all unreclaimed acreage is carried forward as a base level when determining cumulative surface disturbance for a notice or plan in a project area in subsequent years" (May 9, 1984, letter at 3). The regulation at 43 CFR 3809.1-3, quoted above, offers support for the BLM explanation in this regard. Thus, as BLM noted, although deferral of reclamation for certain legitimate mining purposes is allowed, prior to conducting additional operations under a subsequent notice, the "operator shall have completed reclamation of operations which were conducted under any previous notice." 43 CFR 3809.1-3(a). Hence, we agree with BLM that although reclamation may be legitimately deferred, unreclaimed surface disturbance from a prior year's operations must be included in the computation of surface disturbance for purposes of determining whether a plan of operations is required.

In its appeal to the State Office, appellant also contested the BLM calculation of the area of surface disturbance on the following basis: "Oregon State Geologist toured the mine in July 1984, and stated: 'Total surface disturbance is less than 1 acre.[]' Thus we were in compliance with 43 CFR 3809.1-4." Upon request of the State Office, the Burns District Office responded to this allegation in a September 26, 1985, memorandum 4/:

[Appellant's statement] is misleading. It erroneously attempts to substitute State definitions of surface disturbance (used in determining the need for a permit from the State of Oregon) as criteria for whether or not a notice or plan of operation is required under the Federal 43 CFR 3809 regulations. The State regulations do not include the same types of disturbance as the BLM. Furthermore, the quote is inaccurate. The following should explain the situation:

The item refers to a brief on-site inspection conducted on 07/17/84 by a field representative from the DOGAMI 5/ Mined Land Reclamation Section in response to an application by Mr. Seal for a grant of total exemption for his mining operations. The application indicated that this was an exploration project on lands disturbed by surface mining prior to 1972, and involved less than 1 acre of surface disturbance from the prospects and underground tunnels used in Mr. Seal's operations.

Mineral exploration activities are exempt under State regulations so long as each site affected involves less than 1 acre, the total of all areas affected is less than 1 acre for each 8 acres prospected, and the total area affected is less than

4/ It appears from the record that a copy of this memorandum was served on appellant as an enclosure with a letter from BLM dated October 1, 1985.

5/ Oregon State Department of Geology and Minerals Industry.

5 acres. Areas surface mined prior to 1972 which were neither naturally nor intentionally reclaimed are also exempt under the State regulations.

The exact quote from the State report is, "Surface disturbances are currently less than one acre in one spot and less than an aggregate of 5 acres and therefore this site is qualified for a Total Exemption." This statement of acreage pertained only to those types of surface disturbance which qualify as such under State regulations, and did not refer to the surface disturbance which was present at the site.

The BLM estimates of surface disturbance at the site are higher than the State estimates because BLM uses different criteria than the State. BLM estimates use the Federal 43 CFR 3809 regulations as criteria. Surface disturbance under 43 CFR 3809.0-[5](f) includes all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining laws, and all other uses reasonably incident thereto.

On the other hand, the State of Oregon Rules and Regulations for the Oregon Mined Land Reclamation Act are very limited in scope in defining what can be considered as "surface disturbance" compared to the Federal 43 CFR 3809 regulations. Under State statutes, "surface disturbance" refers only to those lands disturbed by actual mining, stockpile areas, etc. Certain types of mining-related disturbance are exempt under the State mined land reclamation regulations. For example, exemptions include such items as logging operations related to the mining project, and all access roads and access road mining sites (for road construction materials). These uses would be counted as surface disturbing under Federal regulations.

The State report refers only to the acreage of disturbance at the site which the State could count under their regulations. The State inspector had to exclude all acreage for access roads, logging areas, etc. from his estimate. In doing so, his resulting estimate was that the remaining surface disturbance was less than 5 acres.

A State permit would have been required if any of the individual areas of surface disturbance was over 1 acre in size. Again, surface disturbance due to access roads, logged areas, etc. could not be counted. The largest contiguous area of disturbance from surface mining excavations was just under 1 acre, and it was this site which was mentioned in the State report. There was only one contiguous area of disturbance which exceeded 1 acre in size, and much of that disturbance was exempt under

State criteria because it was due largely to access roads. After subtracting the exempt acreage, the State inspector believed that the remaining surface disturbance at this second site would be less than one acre.

The State inspector did not make an attempt to determine whether areas surface mined prior to 1972 had been reclaimed before the onset of the current operations.

Appellant has not rebutted this explanation of the apparent discrepancy between the statement of the State geologist and the BLM conclusion that appellant's operations entail a surface disturbance in excess of 5 acres, thus requiring approval of a plan of operations.

Documentation of the amount of surface area disturbance on the Cougar Ridge mine is also found in the EA, which reported:

The main project area for 1984 presently involves about 245 acres, within a block of mining claims covering several thousand acres. Total surface disturbance to date associated with these new activities is about 8.5 acres. Additional surface disturbance proposed for 1984 would add about 5 acres for a pilot mill site and buildings for an office, storage space and housing for miners, about 0.85 acres in new road construction and trenching, and about 3 acres (actual figure dependent upon number of acres to be logged) disturbance from logging operations, for a total of about 17 acres cumulative disturbance within the main 245 acre project area.

(EA at 2). The EA went on to describe the surface disturbance associated with the plan of operation as proposed by appellant in road use and construction, exploration activities, timber harvesting, mining, and milling operations (EA at 3-4).

In a BLM memorandum dated July 18, 1985, from the District Manager to the State Director, the computation of acreage of the surface disturbance at the Cougar Ridge mine was explained:

1) We examined the available information provided by the operators. Areas of disturbance shown on plan of operations maps appeared to exceed five acres.

* * * * *

In 1984, Mr. Seal provided three topographic maps covering the main portion of the plan of operations mining area at a scale of 1 inch = 100 feet, showing areas of surface disturbance. These maps identified some areas of disturbance as being due to 1983 operations, and others as roads and disturbance from earlier mining operations. Mr. Seal also provided a general location

map at a scale of 8 inches = 1 mile showing other sites of disturbance outside the detailed map areas, including locations for a millsite.

These detailed scale maps showed three categories of disturbance: a) areas disturbed by operations in 1983, b) areas of existing roads and mine workings active as of 1983, and c) areas described as having past heavy surface disturbances from historical mining (early 1900's and 1930's) and logging operations.

Measurement of Mr. Seal's detailed maps with a Numonics Model 1224 electronic graphics calculator indicated about 1 acre of disturbance at the areas identified as 1983 work. Measurement of the roads and other mining areas identified as having been disturbed prior to 1983 indicated about 5.6 additional acres of disturbance. Total surface disturbance of this type shown on the detailed map was about 6.6 acres.

Most of the recent areas of mining activity related to the plan of operations were shown as being within seven areas of historical disturbance involving about 45 acres. Other surface disturbance was shown outside the boundaries of the detailed map on the 8 inch = 1 mile scale map, and included other access roads and a storage area on Standard Creek.

During a meeting on 6/15/84, Mr. Seal and Mr. Church had indicated that some of the disturbance shown on these maps was not related to their operations. They also indicated that most of the disturbance related to their operations should not be counted as part of their plan because they considered those areas to have been heavily disturbed by historical roads and mining operations.

2) The project area was field checked to verify the accuracy of the plan of operations map and to determine the extent of historical surface disturbance in the project area.

The measurements of these areas of surface disturbance were spot checked by our District Geologist, George Brown. He spent portions of 11 days examining the project area in June and July, 1984. The examination included inspecting and photographing areas of recent surface disturbance related to the 1980-1983 operations, as well as areas where older disturbance from mining or logging operations could be identified. Aerial photos of the area on file at the district were checked prior to the field examination for background and orientation.

* * * * *

Mr. Seal provided an orientation tour of the area at the start of the field inspection on 6/26/84, pointing out a variety

of features he identified as existing disturbances which were similar to the condition of the project site before the Cougar Ridge project work was begun. These included features such as remnants of overgrown old mine dumps and roadbeds which had not yet been affected by the project operations. Areas related to the ongoing operations were briefly identified, along with potential areas for future expansion.

During the field inspection, those older features were compared with the present condition of the project area and with abundant evidence of recent surface disturbance throughout the project area. For example, improvements on access routes which Mr. Seal considered to be pre-existing roads were examined along the route for evidence of expansion (e.g., recent steep cuts into the slopes with fresh sidecast covering shrubs, trees pushed over along road border, etc). In some cases, unimproved portions of the roads were available for a comparison with those portions which had been upgraded.

In most instances, it generally was not disputed that some sort of access route or mine working had existed there sometime previously. However, the evidence suggested that those old roadbeds or mine workings supported a good growth of vegetation (including grasses, shrubs and trees) prior to the more recent disturbance. The attached photos provide some examples, and others are shown in the environmental assessment. At least one of the old areas of mine workings was logged to provide timber for the project's underground operations. Based on the occurrence of this type of evidence throughout the project area, it was concluded that most (if not all) of the project area had been reclaimed either naturally or by manmade efforts at some time prior to the onset of the new operations in 1980-1984.

The burden of proof is on an appellant to show error in the decision appealed from; in the absence of such a showing, the decision will be affirmed. Wells J. Horvereid, 88 IBLA 345 (1985). Where, as in the present case, a party appeals from a BLM determination that a plan of operations is necessary under 43 CFR 3809.1-4, it is the obligation of the appellant to show that the determination is incorrect. Unless a statement of reasons shows adequate basis for appeal and appellant's allegations are supported with evidence showing error, the appeal cannot be afforded favorable consideration. Howard J. Hunt, 80 IBLA 396 (1984). Where BLM determines that unreclaimed surface disturbance and proposed operations will cause a cumulative surface disturbance of more than 5 acres, and the claimant challenges that determination, the burden is on the claimant to show that 5 acres or less will be affected.

Appellant's reliance on the report of the Oregon State geologist is unfounded. As explained in the Burns District Office memorandum to the State Office quoted above, the list of activities considered to be surface disturbing operations by the State of Oregon is not as comprehensive as the definition of operations found in 43 CFR 3809.0-5(f), which BLM must take into

consideration when approving mining operations on the public lands. 6/ The State findings were not binding on BLM, which is under a statutory and regulatory duty to prevent "undue or unnecessary degradation of the Federal lands." 43 CFR 3809.0-3(b); see FLPMA, § 302, 43 U.S.C. § 1732 (1982).

Appellant proffers no evidence to support its allegation that BLM failed to correctly calculate the area of surface disturbance or to adequately document its calculations. We concur in the Associate State Director's conclusion that the Burns District Office "adequately documented" the disturbance area. Because appellant has failed to establish error in BLM's calculations, appellant has failed to meet its burden of proof, and the decision to require a plan of operations must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Anita Vogt
Administrative Judge
Alternate Member.

6/ 43 CFR 3809.0-5(f) defines "operations" to mean "all functions, work, facilities, and activities in connection with prospecting, discovery and assessment work, development, extraction, and processing of mineral deposits locatable under the mining law * * *."

